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In The
Supreme Court of the United States

F. HOFFMAN-LaROCHE, LTD, *et al.*,

Petitioners,

v.

EMPAGRAN S.A., *et al.*,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICI CURIAE* COMMITTEE TO SUPPORT THE ANTITRUST LAWS AND NATIONAL ASSOCIATION OF SECURITIES AND CONSUMER ATTORNEYS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Committee to Support the Antitrust Laws ("COSAL") and the National Association of Securities and Consumer Attorneys ("NASCAT").[1] COSAL is a nonprofit corporation organized and existing under the laws of the District of Columbia. COSAL is a membership organization founded in 1986. Its members are individuals and organizations, primarily law firms, that are interested in furthering the goals of the antitrust laws. Its members come from across the United States.

One of the purposes of COSAL, as set forth in its Articles of Incorporation, is "to promote and support . . . the enactment, preservation and enforcement of a strong body of antitrust laws of the United States and its political subdivisions." COSAL members have been involved in numerous litigations involving international cartels.

NASCAT is a nonprofit membership organization founded in 1989. The member law firms represent investors and consumers in white-collar crime, fraud and securities cases. NASCAT also fights for investor rights in areas including the securities laws and corporate governance. It has worked to preserve the civil racketeering laws and to lengthen the statute of limitations for securities suits (in the Sarbanes-Oxley law).

A determination that anticompetitive practices occurring outside the territorial boundaries of the United States

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no person other than counsel or *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

cannot give rise to claims in the courts of the United States would have significance to COSAL's and NASCAT's members and their clients.

SUMMARY OF ARGUMENT

The Department of Justice offers a series of policy arguments in favor of petitioners' interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (the "Act"). Nothing in the plain language, structure, or legislative history of the Act suggests that any of these policy considerations were known to, let alone influenced, members of Congress at the time the Act was passed. Even if these post-enactment concerns were somehow relevant, they are unpersuasive and contradicted by the government's experiences and practices.

1. The government argues that the Act should be given a narrow interpretation so that the vitality of the leniency program for self-reporting violators is not jeopardized. The government's concerns are misplaced, however, because the key incentives that have made the program a success – immunity from criminal prosecution and sanctions – remain unaltered by the decision below. And the added civil liability that cartel members face becomes a consideration only if they are confident their action will go undetected if they do not confess, a perilous and unsubstantiated assumption. Thus, it is hardly surprising that even in the face of rulings that endorse respondents' broader interpretation of the Act, the government has enjoyed great success in increasing participation in the leniency program.

2. The government also hypothesizes that the Nation's foreign relations will be undermined by respondents' interpretation of the Act. The government posits that a blanket prohibition on the extraterritorial exercise of jurisdiction is necessary to protect the interests of the United States, but it offers no explanation as to why the traditional principles of comity are inadequate to protect our national interests. Both the courts and the Justice Department have relied upon the doctrine of comity to ensure an appropriate respect for the interests of foreign sovereigns. This case-by-case approach is narrowly tailored to the concerns expressed by the government. The government points to no indication that Congress intended to jettison this well-established approach to accommodating the interests of foreign governments.

3. The government's interpretation of the Act would also have the effect of limiting its own enforcement authority. Both the plain language and the legislative history of the Act make clear that the jurisdictional scope of the government's criminal enforcement authority and private civil enforcement authority is coextensive. Thus, if respondents are unable to bring suit in connection with the foreign transactions at issue here, then so too the government cannot seek criminal penalties in connection with such conduct. In the past, the government has imposed both enhanced sentences and higher criminal fines after taking into account just such transactions. A cramped reading of the Act would divest the government of the authority to continue these enforcement practices.

ARGUMENT

I. The Government's Leniency Program Will Not Be Adversely Affected By An Affirmance Of The Decision Below.

The government hypothesizes that the decision below will "deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government." Brief of the United States ("U.S. Br.") at 7-8. As an interpretive matter, the government's policy argument is quite misplaced given that the leniency program was rarely utilized in 1982 when the Act was passed. Tellingly, the Government offers no indication that any member of Congress considered the Act's implications for the leniency program at the time of the Act's adoption. For this reason alone, the government's policy considerations should be disregarded. To the extent the subsequent adoption of new initiatives necessitates changes to the Act, the government should seek relief from the Congress, not this Court. The government is doing just that in a closely related context. *See* R. Hewitt Pate, Assistant A.G., Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Address Before the Antitrust Section of the American Bar Association Annual Meeting 5 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/20124.htm (endorsing legislative proposal to eliminate treble damages for participants in the leniency program).

In addition to being irrelevant, the government's argument is deeply flawed. As the government itself recognizes, "the *primary deterrent* to cartel activity is the threat of *imprisonment and other criminal penalties* (especially when heightened through the fear of exposure created by the amnesty program)." U.S. Br. at 32 (emphases added). It follows that the principal incentive to participate in the

leniency program is the desire to avoid incarceration. Indeed, the specter of imprisonment has been heightened in recent years by the string of high-profile antitrust convictions resulting in jail time for executives. In 1999 and 2000 alone, 46 individuals were sentenced to prison time for antitrust violations. *See A Primer On U.S. Criminal Antitrust*, www.antitrustinstitute.org/primer.cfm. Many of these prison sentences were headline news.[2] The recent publicity and frequency of these sentences reinforce the pressure built into this regime: as the threat of criminal prosecution increases, so also does the pressure on each of the conspirators to be the first to confess to the authorities.

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[2] *See, e.g.*, David Usborne, *Former Heads of Top Auction Houses Charge With Price-Fixing*, THE INDEPENDENT (LONDON), May 3, 2001, at 5 (Taubmann and Tennant indicted on May 2, 2001); Carol Vogel, *Ex-Chairman At Sotheby's Is Considering Sale of Stake*, N.Y. TIMES, June 4, 2002, at C8 (former chairman of Sotheby's considering selling his stake after having been sentenced to one year and a day for price-fixing); *The Media Business: Advertising – Addenda; Ex-Grey Executive Pleads Guilty to Charges*, N.Y. TIMES, Apr. 9, 2003, at C7 (former executive of Grey Worldwide pleaded guilty to antitrust, mail fraud, bid-rigging and tax-evasion charges and faces 63 to 78 months in prison under a plea agreement; former chief executive of Color Wheel sentenced previous month to 37 months in prison after pleading guilty to antitrust, tax, and fraud charges); AP, *A Summary of Illinois News*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, June 27, 2000 (federal appeals court ordered more prison time for two former Archer Daniels Midland Co. executives, saying $100 million antitrust conspiracy deserved more than two-year sentences); *Executive Sentenced in Price-Fixing Conspiracy*, USIS Washington File, Sept. 24, 1999, *available at* http://usembassy-australia.state.gov/hyper/WF990924/epf512.htm (former executive with UCAR International Inc., the world's largest producer of graphite electrodes, sentenced to nine-month prison term); Robert D. Paul, *International Cartels in Crosshairs*, NEW YORK LAW JOURNAL, Sept. 11, 2000 (listing prison terms ranging from three to five months for multiple former executives of Hoffman-LaRoche and BASF).

Significantly, the resolution of the issues before the Court will not in any way change this dynamic.

Confronted with the very real possibility of jail time, financial considerations quite naturally take a back seat, as the growing success of the leniency program reflects. Nevertheless, the government frets that the decision below will "provide a significant disincentive" to those who would otherwise seek leniency from the government. U.S. Br. at 27-28. The government elides the relevant financial incentives for conspirators. Under the leniency program, the first conspirator to step forward pays "*zero* dollars in criminal fines." James M. Griffin, Deputy Assistant A.G., The Modern Leniency Program After Ten Years – "A Summary Overview of the Antitrust Division's Criminal Enforcement Program", Presentation Before the American Bar Association Section of Antitrust Law Annual Meeting 8 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201477.htm (emphasis added). In this case, for example, Hoffman-La Roche alone avoided between $800 million and $2.1 *billion* in fines by seeking leniency. Gary R. Spratling, Characteristics of the International Cartel Enforcement Environment: The United States – 2002, Presentation Before the American Bar Association's 16th Annual National Institute on White Collar Crime 2002 10 (Feb. 28, 2002). *See also A Primer On U.S. Criminal Antitrust*, www.antitrustinstitute.org/primer.cfm (documenting numerous significant fines).

Further, the leniency applicant *does* receive relief from certain liability that offsets the increased risk of private treble-damage actions. The Sherman Act authorizes the imposition of an order requiring restitution to victims. As this case illustrates, however, the government is fully prepared to waive that requirement in recognition

of "the pendency of civil causes of actions which potentially provide for a recovery of a multiple of actual damages." Plea Agreement at 6, *United States v. F. Hoffman-La Roche, Ltd.* (N.D. Tex. May 20, 1999) (No. 99-CR-184-R).

Even the rare conspirator concerned more about corporate financial exposure than his personal freedom will not be deterred from seeking leniency by the prospect of civil damages. As noted, the criminal fines alone can amount to billions of dollars for each conspirator, and so the financial cost of inaction can be seismic. More fundamentally, the government's concern about the continued allure of the leniency program rests on the concern that cartel members can evade detection through inaction. This Do Nothing strategy is viable only if each participant can trust his fellow conspirators not to turn state's evidence. But there is no honor among thieves, a fact of life that thieves well understand. As previously explained by one of the officials responsible for developing the leniency program, the argument now advanced by the government

> makes sense only if you assume that the company can avoid prosecution and the parade of financial horribles if *it* chooses not to come forward. However, for the reasons described above, that outcome is almost always going to be out of the company's control. A company that elects not to come forward and puts itself and its best interests at the mercy of its competitors (and all of their current and former executives with knowledge of the conspiracy) is taking a grave risk. In most cases, by the time the inside or outside counsel learns of the offense, it is already too late to contain the leakage of information to the government. The boat is already

> sinking, and the only question is whether you are going to grab the life preserver.

Scott D. Hammond, Dir. of Criminal Enforcement, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, Address at the Fifteenth Annual National Institute on White Collar Crime 8 (Mar. 8, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/7647.htm.[3]

Indeed, the government has disparaged *precisely* the argument it now advances. Specifically, the Division's Director of Criminal Enforcement has rejected the notion that the "financial benefits of the Amnesty Program . . . are more than outweighed by the company's exposure to treble damage actions by the victims." Hammond, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, *supra*, at 8. As explained by one of the architects of the current leniency program:

> Decisions like *Empagran* certainly complicate the analysis but the analysis on whether or not to go forward and cooperate [with] the government is essentially the same. The analysis is: if [I] get caught, without having self-reported, I am going to be second, third, or fourth in and then have the same exposure to civil damage consequences as I would if I had self-reported, but will

[3] Moreover, those cartelists who do study the legal landscape recognize that such cases have consistently been resolved by settlements in the range of single-damage awards, rather than treble damages. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

> also face criminal fines and the risk of my executives in jail? So *Empagran* just attaches a higher dollar figure to one part of the equation.

Gary R. Spratling, *Cartel Roundtable, The Architects of Enforcement*, 6 GLOBAL COMPETITION REV. 20, 25 (Oct. 2003).[4]

The validity of the government's previous position is borne out by its recent experience in administering the leniency program. The government has seen "a ten-fold increase in U.S. leniency applications" under its current program. Scott D. Hammond, Dir. of Criminal Enforcement, Beating Cartels at Their Own Game – Sharing Information in the Fight Against Cartels, Address Before the Inaugural Symposium on Competition Policy 14 (Nov. 20, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201614.htm. The "rate of amnesty applications is at an all time high – in the first six months of this fiscal year, we have averaged three applications per month." R. Hewitt Pate, Acting Assistant A.G., Anti-Cartel Enforcement: The Core Antitrust Mission, Address Before the British Institute of International and Comparative Law Third Annual Conference on International and Comparative Competition Law 3 (May 16, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201199.htm. "As a

[4] Nor, in any event, is it correct that the amnesty program is the *sine qua non* of discovering cartels and thus imposing civil liability. In a number of cases, including this one, private parties developed evidence of the cartel prior to, and independent of, the government's investigation. Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763, 770 n.38 (2003) (citing Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST 711, 712-13 (2001)).

result of this increased interest, the Division frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty." Griffin, The Modern Leniency Program After Ten Years, *supra*, at 8. This despite the fact that warning signs of potential liability arose years earlier when civil plaintiffs commenced suits like *Empagran* seeking treble damages for cartel sales in foreign markets. And in March 2002, the Second Circuit in the Christie's case held that such claims in private actions are actionable. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2002), *cert. dismissed*, 124 S. Ct. 27 (2003); *Court Decisions*, NEW YORK LAW JOURNAL, Mar. 19, 2002. Yet the prospect that a defendant would be held liable in private actions for all of its unlawful conduct, including its purely foreign sales, apparently did not deter applications to the leniency program.

Finally, even accepting the government's policy arguments at face value, its proposed reading of the Act would spread immunity for civil damages far too widely. Under the government's interpretation, *all* members of a global conspiracy, not just the *one* that steps forward to disclose the existence of the cartel, are immune from *any* civil liability for their purely foreign anticompetitive sales. The government offers no justification for this result. In contrast to its litigation position, the Administration's current legislative initiative would provide reduced civil liability only to those defendants that actually participate in the leniency program. This type of tailored approach is far more appropriate to the policy concerns voiced by the government than the sweeping immunity sought by petitioners.

II. The Nation's Foreign Relations Will Not Be Affected By An Affirmance In This Case.

The government expresses misgivings that "the court of appeals['] holding would also present a risk of undermining the foreign relations of the United States." U.S. Br. at 28-29. The traditional approach to addressing potential foreign relations difficulties raised by extraterritorial application of American laws has been to employ principles of comity. The government has long recognized that

> [the] notion that American and foreign interests have to be weighed against one another in deciding whether to apply the antitrust laws to "extraterritorial" conduct has been followed by a number of other U.S. courts. It has been variously characterized as being based on principles of comity and principles of conflicts of laws, but in any event it is now an accepted part of the American antitrust jurisprudence. It has also been for some time, and continues to be, part of the Justice Department's enforcement policy.

Charles S. Stark, Chief, Foreign Commerce Section, Antitrust and Transnational Conduct – Principle and Practicality, Remarks Before the Annual Conference of the Canadian Council of International Law 4 (Oct. 21, 1983). *See also* 1995 Department of Justice Antitrust Enforcement Guidelines for International Operations ("1995 Department of Justice Guidelines") 110 ("In enforcing the antitrust laws, the Agencies consider international comity. . . . Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected."). The government has also acknowledged that in cases between private parties, courts routinely

undertake a comity analysis. *See* 1995 Department of Justice Guidelines 111.

The doctrine of comity allows courts to make a nuanced, case-specific determination as to the relative interests of the United States and interested foreign sovereigns. Under the *Timberlane* factors, endorsed by the Solicitor General in his amicus brief in *Hartford Fire Insurance Co. v. State of California*, No. 93-2004 (filed Dec. 1992), at 25, courts must weigh

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 614 (9th Cir. 1976). The government's interpretation of the Act would foreclose such a determination. Courts would simply be divested of jurisdiction, no matter how compelling the American interests were. The government offers no justification whatsoever for the abandonment of the traditional method of accommodating foreign relations.

Outside the confines of this case, the government seems quite content to rely upon a case-by-case determination of our Nation's interests. Indeed, the United States has codified this approach in a series of bilateral agreements on

competition law. Included in these agreements are provisions concerning notification of charges or complaints, as well as factors to consider in attempting to avoid conflicts between enforcing authorities. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1995, U.S.-Can., 2028 U.N.T.S. 135, art. II (Notification), art. VI (Avoidance of Conflicts). In Article VI of their Agreement, the United States and Canada set forth nine different factors each must consider in any situation where it "appears that one Party's enforcement activities may adversely affect the important interests of the other Party." *Id.* at art. VI, § 5. This approach has been replicated in a series of similar bilateral agreements.[5] In

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[5] *See also* Agreement Between The Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1999, U.S.-E.C., 30 I.L.M. 1487, art. II (Notification), art. V (Cooperation Regarding Anticompetitive Activities in the Territory of One Party That Adversely Affect the Interests of the Other Party), art. VI (Avoidance of Conflicts Over Enforcement Activities); Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, July 11, 2000, U.S.-Mex., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,509, art. II (Notification), art. VI (Avoidance of Conflicts); Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,507, art. II (Notification), art. IV (factors in avoidance of conflicts); Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, U.S.-Aus., art. II, § C (Notification); Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business

(Continued on following page)

fact, the United States and Israel, as well as agreeing on notification and avoidance of conflict, explicitly codified the notion of comity in their bilateral agreement. Agreement Regarding the Application of Their Competition Laws, Mar. 15, 1999, U.S.-Isr., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,506, art. II (Notification), art. V (Positive Comity), art. VI (Avoidance of Conflicts). *See also* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-E.C., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504a, art. III (Positive Comity).

This case-by-case approach makes perfect sense in light of the substantial gaps in the antitrust enforcement efforts of foreign sovereigns. Petitioners make much of the fact that some foreign nations have adopted their own antitrust regimes. But, at the time of the Act's passage in 1982, the vast majority of such laws did not exist, and thus it is self-evident that Congress did not rely upon the efficacy of foreign enforcement regimes in defining the reach of the Sherman Act. Until recently, "few countries

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Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, art. IV (Requiring notification and appropriate consultation and coordination in the event application of the antitrust laws likely to affect important interests of the other party); Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of their Competition Laws, Oct. 26, 1999, U.S.-Braz., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,508, art. II (Notification), art. IV (Cooperation Regarding Anticompetitive Practices in the Territory of One Party That May Adversely Affect the Interests of the Other Party).

had antitrust laws and fewer still enforced them." Charles A. James, Assistant A.G., International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition 2 (Oct. 17, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9330.htm. For that matter,

> a not infrequent reaction of foreign governments to news that the Antitrust Division was investigating the activities of international cartels was to leap to the defense of "their" firms, accuse the U.S. of "extraterritorial" tendencies in defending our consumers, threaten to invoke blocking statutes, and express astonishment that any country should even want to have antitrust laws, much less enforce them.

Joel I. Klein, Assistant A.G., Address at the International Anti-Cartel Enforcement Conference 7-8 (Sept. 30, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/3727.htm. In any event, "even among countries with reasonably sound and longstanding antitrust laws, we too often see them, even today, failing to provide the resources or political support to its competition authorities to enable them to enforce their law in an effective manner." Joel I. Klein, Principal Deputy Assistant A.G., International Antitrust: A Justice Department Perspective, Address Before the Fordham Corporate Law Institute, at *5 (Oct. 26, 1995), *available at* http://www.usdoj.gov/atr/public/speeches/forhamjik.txt.

Not surprisingly, foreign sovereigns are often solicitous of the economic interests of resident corporations accused of membership in international cartels. Because of

this reality, many foreign enforcement agencies are "*powerless* to curb [cartels]. Indeed, the jurisdiction of domestic competition authorities is usually limited to practices which affect competition in their own country." Frédéric Jenny, Vice Chairman, Conseil de la concurrence; Chairman, OECD Competition Law and Policy Committee; Chairman, WTO Working Group on Trade and Competition Policy, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *in* 5 COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM: PERSPECTIVES FROM THE EU, JAPAN AND THE USA 295, 306 (Clifford A. Jones & Mitsuo Matsushita eds., 2002) (emphasis added).[6] In light of this reality, a major enforcement "gap" would result if this country were to "withhold enforcement against the foreign actors implementing or operating in the shadow of home policy." Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916-17 (2003). If we "exercise restraint out of respect for

[6] Trade officials in cartel members' home governments frequently foster their activities. The reality in some countries is that "[c]ompetition officials are kept on short leashes. . . . This means that with the support of their political leaders – who, alas, are frequently wary of antitrusters – trade officials promote the most economically damaging cartel behavior of all: market allocation agreements involving many agricultural products, heavy industrial products, textiles, and, increasingly, electronic products." Douglas E. Rosenthal, *Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: We Need More "Old-Time Religion": A Response To Jim Rahl*, 10 NW. J. INT'L L. & BUS. 84, 87 (1989). *See also* Kurt Stockmann, *Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: The Janus-Face of Competition Policies*, 10 NW. J. INT'L L. & BUS. 31, 31 (1989) (Although many nations will protect domestic companies from each other, their international competition policies "encourage, authorize, and even compel restraints of trade.").

restraining nations' sovereignty . . . the gap may be great, as in the case of . . . commodity cartels." *Id.* at 923.

This very case illustrates such an enforcement gap. Although petitioners trumpet the legal actions pending in several foreign jurisdictions, Petitioners Brief at 4, they neglect to mention that they face no enforcement actions in the vast majority of countries in which they charged monopolistic prices. Cartelists well understand this enforcement gap. They exploit it by operating in "countries which [do] not have a competition policy and . . . they engage[] systematically in predatory pricing or dumping whenever a developing country [is] building up a domestic industry." Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *supra*, at 315.[7]

III. The Government's Narrow Interpretation Of The Act Is Inconsistent With Its Long-Standing Approach To Extraterritorial Application Of The Sherman Act.

The government predicts that the court of appeals' interpretation of the Act will undermine its ability to enforce the antitrust laws. U.S. Br. at 1. Just the opposite

[7] Foreign antitrust laws also very rarely provide for civil damage awards, which Congress has correctly determined to be an essential element of deterrence. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Comm. on the Judiciary*, 99th Cong. 17 (1985) (statement of Charles F. Rule, Acting Assistant A.G.) ("It must be recognized, however, that foreign courts may be unavailable for, or unhospitable to, private causes of action of the kind represented by U.S. antitrust litigation.").

is true. As respondents demonstrate, the jurisdictional scope of the government's criminal enforcement authority and private parties' civil enforcement authority is coextensive. The plain language of the Act defines the jurisdictional boundaries of the Sherman Act without drawing any distinction between civil and criminal enforcement actions. As the House Report recognized, the Act's definition of subject matter jurisdiction applies equally "against Sherman Act suits by the Department of Justice and private parties." H.R. REP. 97-686, at 8 (1982). Thus, it is clear that if private parties are not able to bring suit for injuries resulting from foreign sales of a global cartel impacting the United States, then neither will the government.

Such a limitation on the government's criminal enforcement authority would preclude its repeated practice of imposing criminal penalties on antitrust violators on the basis of their worldwide sales. In case after case, the government has invoked purely foreign sales in assessing the culpability of those who violate the Sherman Act. Just three Terms ago, the Solicitor General recognized as much:

> [C]onsistent with the Fifth Circuit's decision, a court may consider the *foreign commerce* affected by the illegal conduct when the amount of affected domestic commerce understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on United States consumers. In that circumstance, the court may take into account the defendant's *worldwide sales affected by the conspiracy in making an upward departure in a defendant's sentence*. . . .

Brief of the United States at 9-10, *Statoil ASA v. HeereMAC V.O.F.* (U.S. filed Jan. 2002) (No. 00-1842) (emphasis added).[8] *See also* Gary R. Spratling, Deputy Assistant Attorney General, "Negotiating the Waters of International Cartel Prosecutions," Address at the 13th Annual National Institute on White Collar Crime 18 (Mar. 4, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2275.htm ("[W]hen the amount of U.S. commerce affected by a defendant in an international cartel understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on American businesses and consumers, *the Division will consider the defendant's worldwide (U.S. and foreign) sales* in the Sentencing Guidelines calculation." (emphasis added).

In its *Statoil* brief, the government pointed to two plea agreements in which this approach had been adopted. *See* Brief of the United States in *Statoil* at 10. For example, in *United States v. Roquette Freres,* No. CR 97-00356 (N.D. Cal. 1997), the government negotiated a fine on the basis of foreign sales because the defendant's United States market share was relatively small compared to its share of the worldwide market. Brief of the United States in *Statoil* at 10. Based on defendant's volume of American commerce, the guidelines fine would have been $748,000 to $1,282,000. The court imposed the agreed-upon fine of $2.5 million. *Id.* at 10 n.5. Likewise, the government has repeatedly submitted sentencing memoranda predicated on the view that criminal fines under the Sherman Act should reflect

[8] This passage demonstrates that the government mistakenly assumes that its criminal enforcement authority will not be affected by the resolution of this case.

foreign sales of a worldwide cartel. *See, e.g.*, Sentencing Memorandum at 3-4, *United States v. Merck KgAA* (N.D. Tex. filed May 5, 2000) (No. 300-CR-189-R) (assessing defendant's culpability by reference to its sales "in the United States *and elsewhere*") (emphasis added); Transcript of Plea of Guilty and Sentencing at 7-8, *United States v. Lonza, AG* (N.D. Tex. filed Dec. 3, 1999) (No. 3:99-CR-338-R) (same); Sentencing Memorandum, *United States v. Degussa-Huls AG* (N.D. Tex. filed May 5, 2000) (No. 300-CR-187-R) (same); *Sentencing Memorandum* at 3-4, *United States v. Eisai Co.* (N.D. Tex. filed Sept. 9 1999) (No. 3:99-CR-335-R) (same); *Sentencing Memorandum* at 3-4, *United States v. Daiichi Pharmaceutical* (N.D. Tex. filed Sept. 9, 1999) (No. 3:99-CR-334-R) (same).

Similarly, the Solicitor General's brief in *The Timken Roller Bearing Company v. United States*, No. 352, at 83, stated:

> The foreign cartel arrangements were held by the district court to be illegal not only as direct restraints upon United States foreign commerce, but also as part of the over-all conspiracy to eliminate competition. The arrangements were links in the conspiratorial chain designed to suppress competition on a world-wide basis and *would have violated the Sherman Act even if they had related solely to the commerce of foreign nations.*

(Emphasis added and internal citations omitted).

In short, the government's own course of conduct confirms the propriety of enforcing the Sherman Act to reach foreign sales such as those at issue here. This approach makes perfect sense given that the success of cartels aimed at the United States depends upon foreign

restraints, as respondents have demonstrated in their brief.

In the instant case, the government reaches a contrary conclusion only by focusing myopically on the specific transactions at issue rather than on the conduct of the cartel members as a whole. *See, e.g.*, U.S. Br. at 10 (objecting to application of the Sherman Act to "injuries that [respondents] sustained entirely overseas and that arose out of purely foreign sales transactions that had no substantial effect on United States commerce"). This fixation on the specific sales at issue is flatly inconsistent with the government's emphasis on assessing the *conduct* of the conspirators as a whole. The government's brief in *Statoil* recognized that "[w]hen an international cartel's *conduct as a whole* has [a direct, substantial and reasonably foreseeable] effect, 'such effect gives rise' to the United States' 'claim' under the Act." Brief of the United States in *Statoil* at 8 (emphasis added). Likewise, the government's own guidelines identify the "conduct" of conspirators, not specific transactions, as the appropriate analytical focus in assessing United States jurisdiction:

> The Agencies would have to determine whether the challenged *conduct* had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. Furthermore, since "the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself – rather than the overt act performed in furtherance of it," the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce.

1995 Department of Justice Guidelines 107 (alteration in original) (emphasis added). Focusing on the conduct of conspirators such as petitioners is crucial to vindicating the broader purposes of the Sherman Act. In the absence of price fixing in foreign markets, exports from those countries would quickly ensure the demise of the cartel in the United States.

Finally, quite apart from restricting its criminal enforcement authority, the government's interpretation of the Act will reduce the deterrent effect of the Nation's antitrust laws, which depend upon the combination of strong public *and* private antitrust enforcement. Congress has long recognized that the government acting alone is not enough to fulfill the goals of the Sherman Act. *See, e.g., Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (same).

This case illustrates the critically important role that private enforcement plays in detecting and putting an end to price-fixing cartels. "Class Plaintiffs uncovered the alleged conduct among bulk vitamins producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing." Order at 5, *In re Vitamins Antitrust Litig.*, Misc. No. 99-197 (Feb. 18, 2004). In fact, private civil litigants began pursuing the vitamins case in the spring of 1997, six months before the government's grand jury was disclosed. Private antitrust suits predated the first indictments in the case by almost a

year, and the principal indictments by more than a year and a half. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust 711, 713-14 (2001). Hoffman-La Roche itself acknowledges that it was not until the private enforcement suits were launched that its internal investigations were able to uncover the conspiracy.[9]

Even the combined efforts of public and private enforcement are unlikely to produce any "overdeterrence." Economists have concluded that the "optimal fine" for deterrence purposes is "187% of the commerce affected by the cartel," but that "actual fines imposed were found to be less than 1% of the level necessary to deter cartel conduct. While fines have increased significantly since these studies were conducted – both in dollar amounts and as a percentage of affected commerce – they are not now and

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[9] At a May 21, 1999 press conference announcing the guilty pleas, Hoffman-La Roche's CEO, Franz Humer, explained:

> In 1997, responding to the settlement in the citric acid case and to the news of an investigation of the bulk vitamins industry, Roche initiated an internal inquiry of its own, which at the time did not turn any evidence of wrongdoing. A second internal inquiry prompted by class action lawsuits filed against Roche and other companies in early 1998 for alleged price-fixing in the bulk vitamins market revealed that further action was needed. The inquiry was carried out in collaboration with US experts. Internal measures were implemented without delay to ensure an immediate halt to any antitrust violations. The findings from this second inquiry formed the basis for Roche's decision to offer, on 1 March this year, its full cooperation in the US Justice Department investigation.

Available at http://www.roche.com/med-corp-detail-1999?id=201&medialanguage=e.

never will be *anywhere near* the optimal fine level established by those studies." James M. Griffin, Deputy Assistant A.G., Key Challenges in Public Enforcement Against International Cartels, Address Before the British Institute of International & Comparative Law Second Annual Conference on International and Comparative Competition Law: Trends and Tensions 6-7 (May 2002) (emphasis added).

It is therefore essential to make would-be cartelists appreciate not merely the prospect of "criminal fines," but also "the other costs and consequences of the cartel case – U.S. treble damage actions, non-U.S. enforcement actions and civil actions, and corporate governance and shareholder actions," which in combination have "a much greater impact on the deterrence analysis." Donald C. Klawiter, *Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, 69 GEO. WASH. L. REV. 745, 762-63 (2001).

This case demonstrates that the sanctions of criminal enforcement alone are not enough to deter cartel activity. The lead petitioner continued its central role in the vitamins cartel despite having been *criminally prosecuted* for participating in another cartel. After pleading guilty to participating in the citric acid cartel, "Hoffmann-La Roche officials continued to meet regularly and collude on vitamin sales and lied to government investigators about the existence of the vitamin cartel," engaging in a "brazen disregard for the antitrust laws." Belinda A. Barnett, Sr. Counsel to Assistant A.G., Antitrust in the Twenty-First

Century – "Status Report on International Cartel Enforcement", Address Before the State Bar of Georgia Antitrust Law Section 4 (Nov. 30, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/7086.htm. "Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel." Scott D. Hammond, Dir. of Criminal Enforcement, Lessons Common to Detecting and Deterring Cartel Activity, Address at the 3rd Nordic Policy Competition 6 (Sept. 12, 2000).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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